10 Eight

In Service for Arkansas Law Enforcement

Arkansas Attorney General Mike Beebe

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Dear Ten-Eight Reader:

I hope that each of you will take part in this year's Missing Children's Day Ceremony, held to honor Arkansas' missing children and their families. It will take place May 3, 2006, on the beautiful grounds of MacArthur Park, which also is home to the Attorney General's Arbor of Hope, a place of promise and encouragement to families waiting to be reunited with missing children.

Let this gathering serve as a reminder that teamwork and community spirit can truly make a difference, that we must never give up hope, and that we will persevere with courage and faith. With shared responsibility and a willingness to become involved, we can make our communities safer and more secure for our children today and every day. Thanks for everything you do to keep our citizens safe.

Sincerely,

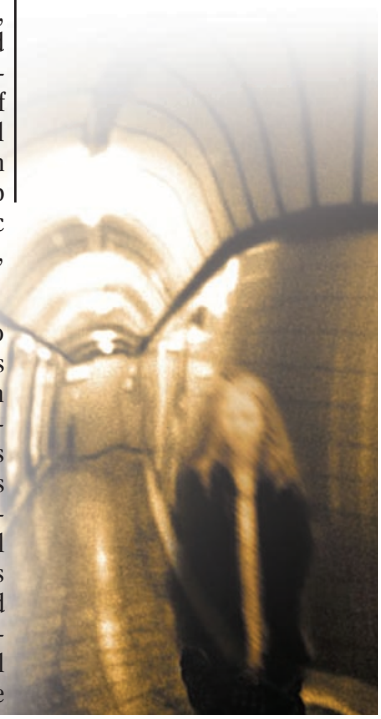
Mike Beebe

First Annual Conference on Crimes against Women

By Karen Wallace, Assistant Attorney General

In early March, Assistant Attorneys General Clay Hodges and Karen Wallace of the Appeals Division of the Attorney General's Criminal Department attended the first-annual Conference on Crimes against Women, sponsored by the Dallas Police Department and the Genesis Women's Shelter. The conference focused on improving the response by the criminal-justice system to crimes of violence against women. Case studies included those of Laci Peterson, the Green River Killer, and the BTK Killer, and law-enforcement officers and prosecutors involved in those cases provided insight into the capture and prosecution of the suspects. Topics of study included the investigation and prosecution of cold-case sexual assaults, interviewing victims of domestic violence, overcoming the defenses of consent and voluntary intoxication in sexual-assault cases, the use of DNA in cold-case homicide investigations, the impact of *Crawford v. Washington* on crimes against women, stalking, and batterers' tactics. Also studied were the interviewing and interrogation procedures in cases of crimes against women, successful investigation and prosecution of sexual assault, the relationship between child abuse and domestic violence, typology of sex offenders, and the trafficking of women.

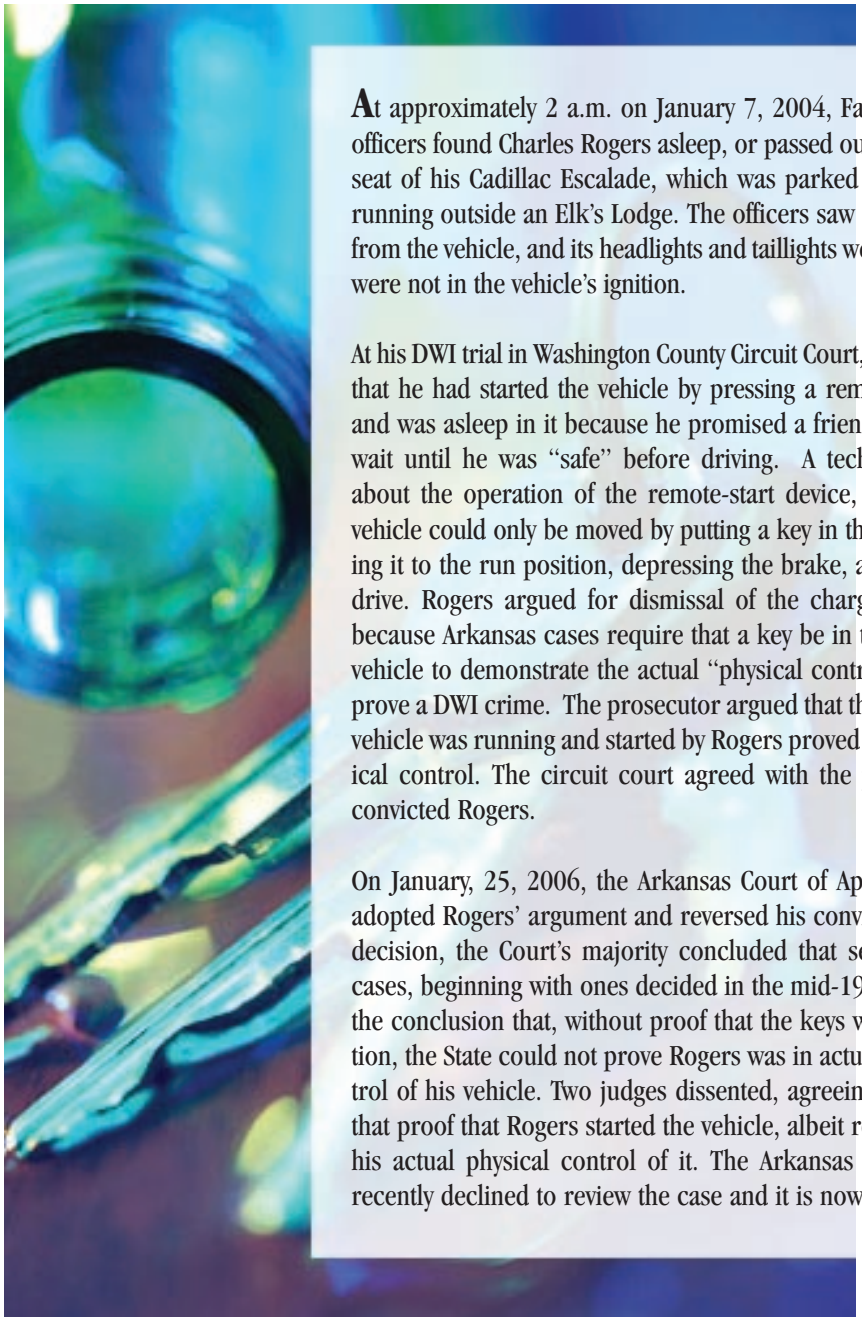
The Dallas Police Department also co-sponsors the annual Crimes against Children Conference, held in August of each year. That conference is also sponsored by the Dallas Children's Advocacy Center and is attended by law-enforcement personnel and prosecutors from all over the nation. Assistant Attorneys General Hodges and Wallace attended the conference last year. For information on the eighteenth annual Crimes against Children Conference to be held August 21-24, 2006, visit www.dcac.org/pages/cacc.aspx.



Arkansas Court of Appeals

Overturns DWI in Case of Remotely Started Vehicle

By David Raupp, Senior Assistant Attorney General



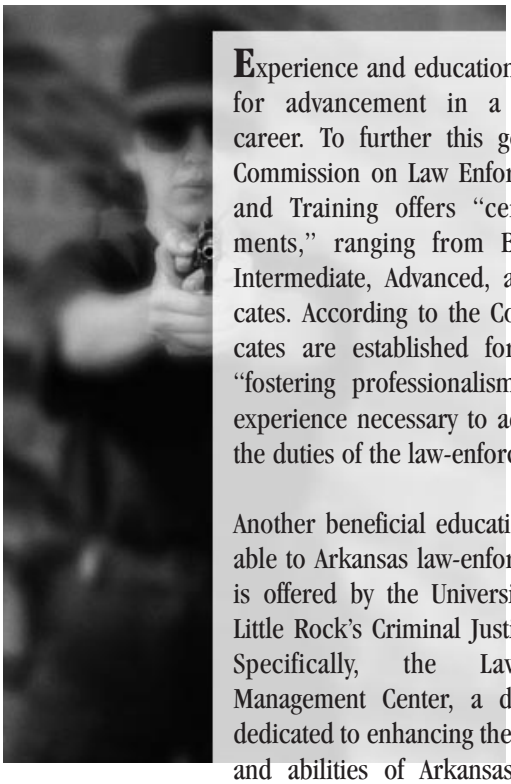
At approximately 2 a.m. on January 7, 2004, Fayetteville police officers found Charles Rogers asleep, or passed out, in the driver's seat of his Cadillac Escalade, which was parked with the motor running outside an Elk's Lodge. The officers saw exhaust coming from the vehicle, and its headlights and taillights were on. The keys were not in the vehicle's ignition.

At his DWI trial in Washington County Circuit Court, Rogers testified that he had started the vehicle by pressing a remote-start button and was asleep in it because he promised a friend that he would wait until he was "safe" before driving. A technician testified about the operation of the remote-start device, noting that the vehicle could only be moved by putting a key in the ignition, turning it to the run position, depressing the brake, and shifting into drive. Rogers argued for dismissal of the charges against him because Arkansas cases require that a key be in the ignition of a vehicle to demonstrate the actual "physical control" required to prove a DWI crime. The prosecutor argued that the proof that the vehicle was running and started by Rogers proved his actual physical control. The circuit court agreed with the prosecutor and convicted Rogers.

On January, 25, 2006, the Arkansas Court of Appeals, however, adopted Rogers' argument and reversed his conviction. In a 4-2 decision, the Court's majority concluded that several Arkansas cases, beginning with ones decided in the mid-1980s, compelled the conclusion that, without proof that the keys were in the ignition, the State could not prove Rogers was in actual physical control of his vehicle. Two judges dissented, agreeing with the State that proof that Rogers started the vehicle, albeit remotely, proved his actual physical control of it. The Arkansas Supreme Court recently declined to review the case and it is now the law.

HELPER'S HIGHLIGHT & CJI

By Stephen Svetz III, Education and Prevention Instructor

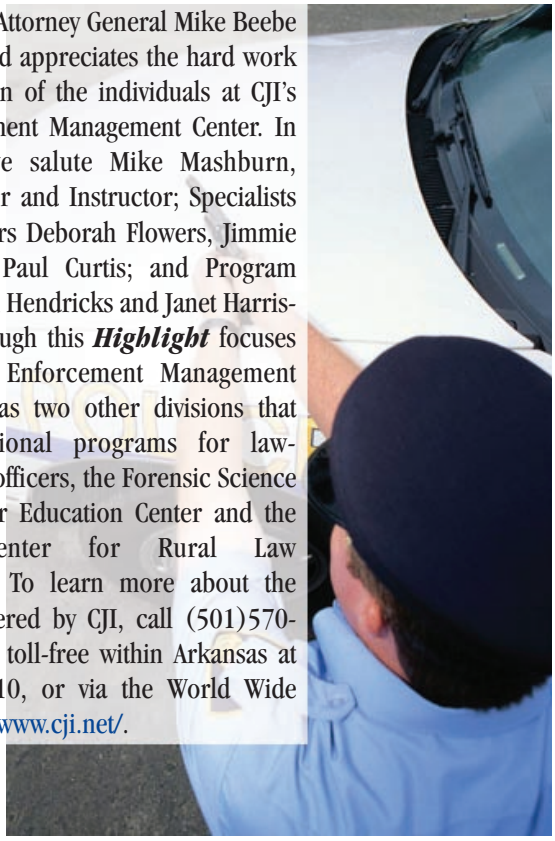


Experience and education are key elements for advancement in a law-enforcement career. To further this goal, the Arkansas Commission on Law Enforcement Standards and Training offers "certificate advancements," ranging from Basic to General, Intermediate, Advanced, and Senior certificates. According to the Commission, certificates are established for the purpose of "fostering professionalism, education, and experience necessary to adequately perform the duties of the law-enforcement service."

Another beneficial educational service available to Arkansas law-enforcement personnel is offered by the University of Arkansas at Little Rock's Criminal Justice Institute (CJI). Specifically, the Law Enforcement Management Center, a division of CJI, is dedicated to enhancing the knowledge, skills, and abilities of Arkansas law-enforcement professionals by providing management education and training courses customized to meet their needs. The dedicated staff at CJI has worked diligently for the past several years to create programs to aid law-enforcement leaders in obtaining the education required to be effective leaders in today's ever-changing world, and we are grateful for their efforts. All classes are free to Arkansas law-enforcement personnel and are held in convenient locations around the state with the main campus located in Little Rock.

One of the programs offered at CJI is the "School of Law Enforcement Supervision," which includes course topics such as Organizational Theory, Administration, Leadership, Human Resource Management, Legal Issues, Decision Making, and Evaluation. These courses are held one week a month for four months, and the program is offered twice a year. Instructors include college faculty, distinguished lecturers recognized as experts in their profession, and CJI personnel. A certificate is awarded upon completion, and this particular class converts to nine college-credit hours.

The staff at CJI has teamed up with various two- and four-year colleges across the state to offer higher-education opportunities to Arkansas law enforcement. This partnership allows law-enforcement professionals to obtain Certificates of Proficiency, Technical Certificates, and Associate of Applied Science degrees.



The Office of Attorney General Mike Beebe recognizes and appreciates the hard work and dedication of the individuals at CJI's Law Enforcement Management Center. In particular, we salute Mike Mashburn, LEMC Director and Instructor; Specialists and Instructors Deborah Flowers, Jimmie Hefner, and Paul Curtis; and Program Assistants Kim Hendricks and Janet Harris-George. Although this ***Highlight*** focuses on the Law Enforcement Management Center, CJI has two other divisions that offer educational programs for law-enforcement officers, the Forensic Science and Computer Education Center and the National Center for Rural Law Enforcement. To learn more about the programs offered by CJI, call (501)570-8000, or call toll-free within Arkansas at (800)635-6310, or via the World Wide Web at http://www.cji.net/.

Search of Home *with Warrant Invalidated*

When Preceded by Improper Warrantless Entry

By Vada Berger, Assistant Attorney General

clear & positive evidence

Under the Fourth Amendment to the United States Constitution, a warrantless entry into a home by a police officer is presumed to be unreasonable, or, in other words, unconstitutional. A warrantless entry can be proper, however, if there are probable-cause and exigent circumstances or if the homeowner consents to the warrantless entry. Exigent circumstances are those requiring immediate action or attention, such as the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a felony suspect. Consent, in turn, must be clear, positive, and voluntary. Because consent must be clear and positive, it usually cannot be inferred from the circumstances. If an improper warrantless entry is made, then evidence seized as a result of the entry must be suppressed, even if the evidence is not actually seized until after a search warrant is obtained, because the warrant is based upon information discovered through the improper entry.

In the recent case of *Bulloch v. State*, the Arkansas Court of Appeals relied on these principles to conclude that evidence seized pursuant to a search warrant had to be suppressed. In *Bulloch*, two officers went to a house in response to a report of narcotic activity, loud music, underage drinking, driving in a neighbor's yard, and parking problems. Just as the officers arrived at the scene, two men also drove up to the house, got out of the car, and went to the porch. When one of the officers asked about the man who was the subject of the complaints they had received, one of the men offered to go inside to get the man in question. When he attempted to close the door as he went inside, one of the officers blocked the door with her foot to prevent it from shutting. She explained that she did this for safety purposes – to keep the man in her line of sight. When the man the officers were looking for came to the door and one of them spoke to him, he turned around and walked back into the house with that officer following him inside and the other officer standing in the doorway. The officer who remained in the doorway saw what appeared to be powder cocaine on the kitchen table. At that point, the house was secured and a warrant was obtained, resulting in the discovery of cocaine, marijuana, scales, pipes, and pills.

The Arkansas Court of Appeals held that a warrantless entry occurred as soon as the first officer put her foot in the door to keep it open and that this entry was not justified by exigent circumstances. At that point, all the officer knew was that "there were three guys drinking[,]" which was not enough to establish circumstances requiring immediate action. The Court also concluded that the officers did not have consent to enter the home. The Court held that an officer who follows someone inside a residence after informing him that the officer would like to speak with him has, at most, "implied consent" to enter, and that is not sufficient for a warrantless entry into a home. The Court added that the fact that the man did not object to the officer coming inside was irrelevant because the burden was on the government, not the suspect, to show that entry into the house was by consent.

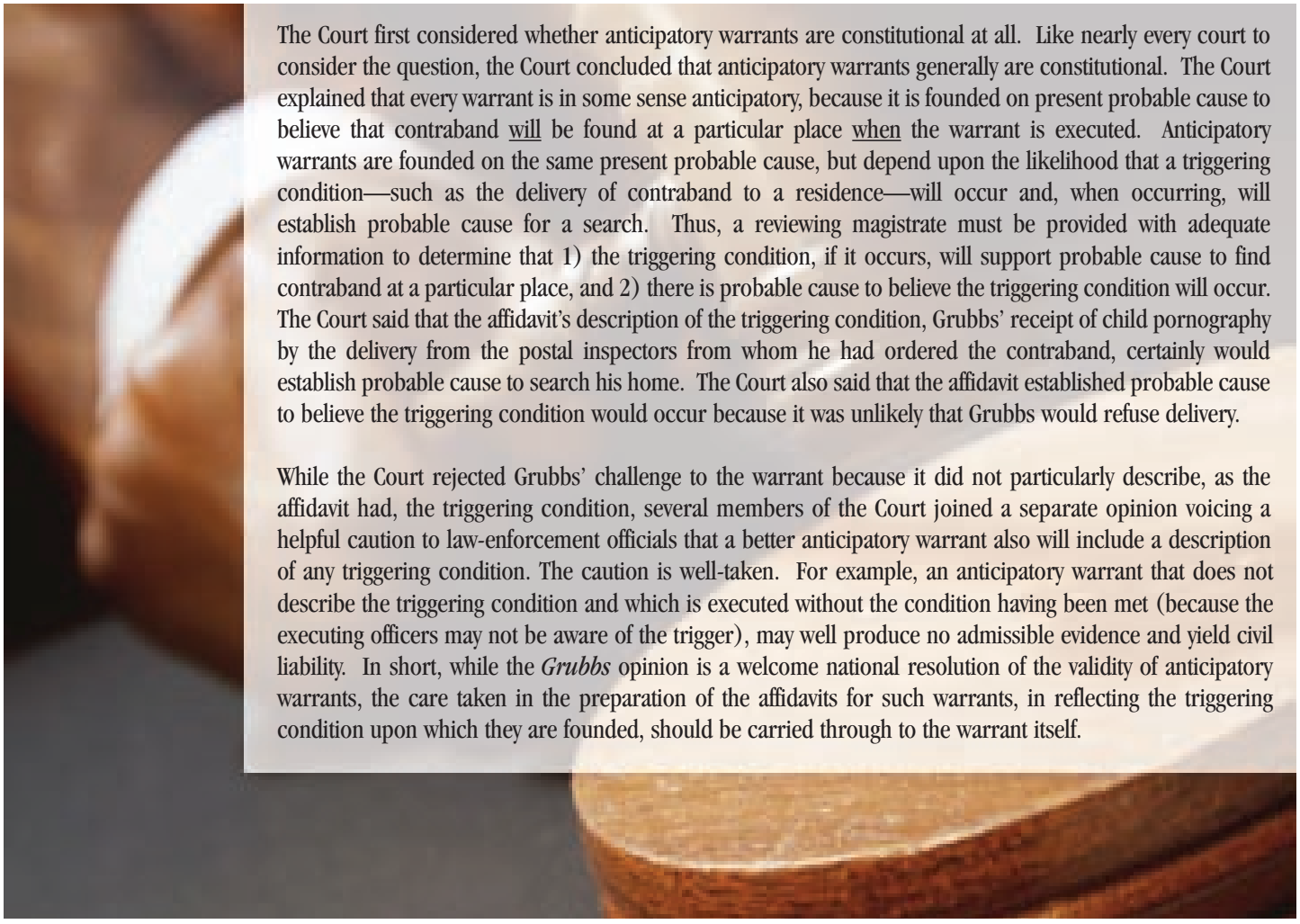
Bulloch highlights the point that officers must be very careful before entering a home without a warrant. Otherwise, even evidence seized pursuant to a later-obtained warrant is subject to being suppressed. The chief lesson of the case is that officers must have clear and positive evidence that they have permission to enter a home. Merely following a person inside is not enough to establish consent, even if the homeowner does not specifically object. While this latter requirement may seem counterintuitive, it is more readily and easily understood if officers are aware of the animating principle behind it – that warrantless entries into homes by police officers are presumed unconstitutional.

United States Supreme Court
Approves Anticipatory Warrants

By David Raupp, Senior Assistant Attorney General

The validity of anticipatory search warrants, such as those conditioned on the delivery of contraband to a residence, has been recognized by courts throughout the United States for several decades, including in Arkansas. Until this year, however, the United States Supreme Court had not definitively addressed the constitutionality of such warrants. On March 21, 2006, in *United States v. Grubbs*, the Court unanimously upheld their use against Fourth Amendment challenges.

Grubbs ordered a videotape containing child pornography from a Web site that was being operated secretly by postal inspectors. The inspectors sought an anticipatory warrant to search Grubbs' home, based on his order and conditioned on his receipt of the videotape in his home, (a so-called "triggering condition"). A federal magistrate issued the warrant, but did not repeat the triggering condition in the text of the warrant itself. The warrant was executed and Grubbs was arrested. He challenged the warrant on the absence of the triggering condition, but lost at a suppression hearing in the trial court. He pleaded guilty to a federal child-pornography crime, reserving the right to challenge the warrant on appeal. He prevailed on appeal, but the Supreme Court reversed.



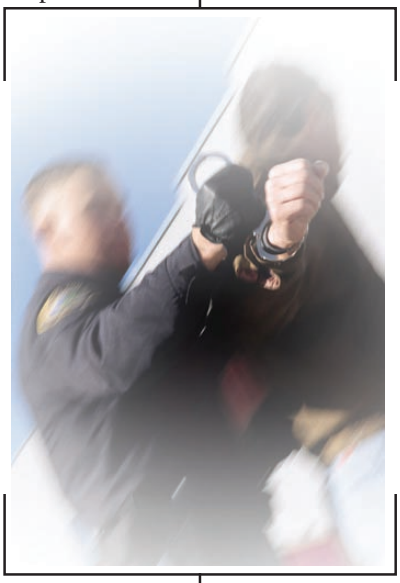
The Court first considered whether anticipatory warrants are constitutional at all. Like nearly every court to consider the question, the Court concluded that anticipatory warrants generally are constitutional. The Court explained that every warrant is in some sense anticipatory, because it is founded on present probable cause to believe that contraband will be found at a particular place when the warrant is executed. Anticipatory warrants are founded on the same present probable cause, but depend upon the likelihood that a triggering condition—such as the delivery of contraband to a residence—will occur and, when occurring, will establish probable cause for a search. Thus, a reviewing magistrate must be provided with adequate information to determine that 1) the triggering condition, if it occurs, will support probable cause to find contraband at a particular place, and 2) there is probable cause to believe the triggering condition will occur. The Court said that the affidavit's description of the triggering condition, Grubbs' receipt of child pornography by the delivery from the postal inspectors from whom he had ordered the contraband, certainly would establish probable cause to search his home. The Court also said that the affidavit established probable cause to believe the triggering condition would occur because it was unlikely that Grubbs would refuse delivery.

While the Court rejected Grubbs' challenge to the warrant because it did not particularly describe, as the affidavit had, the triggering condition, several members of the Court joined a separate opinion voicing a helpful caution to law-enforcement officials that a better anticipatory warrant also will include a description of any triggering condition. The caution is well-taken. For example, an anticipatory warrant that does not describe the triggering condition and which is executed without the condition having been met (because the executing officers may not be aware of the trigger), may well produce no admissible evidence and yield civil liability. In short, while the *Grubbs* opinion is a welcome national resolution of the validity of anticipatory warrants, the care taken in the preparation of the affidavits for such warrants, in reflecting the triggering condition upon which they are founded, should be carried through to the warrant itself.

An Officer Must Articulate Specific Reasons for Contraband Being Immediately Apparent in Pat-Down Searches

By Laura Shue, Assistant Attorney General

For the protection of police officers or others, *Terry v. Ohio* authorizes police officers who have detained people they reasonably suspect are armed and dangerous to conduct a reasonable pat-down search for weapons. This authority, however, is narrowly drawn, and such "pat downs" are strictly limited to those necessary for the discovery of weapons that might be used to harm the officer or others nearby. The pat-down search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." If the protective pat-down search goes beyond that deemed necessary to determine if the suspect is armed, it is no longer valid under *Terry*, and its fruits will be suppressed.



Deciding whether a seizure of contraband during a pat-down search is within the permissible scope of *Terry* requires application of the "plain-feel" doctrine. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the pat down for weapons. If the object is contraband, its warrantless seizure is justified by the same considerations that apply in the plain-view context.

A recent case highlights the importance of an officer articulating reasons that explain why an object was immediately apparent as contraband. In *Rice v. State*, the Arkansas Court of Appeals reversed a conviction because the officer's pat-down search exceeded the scope of a pat down for weapons. An officer asked Rice if he would consent to a pat-down search for weapons. The appellant consented to the search, the scope of which was limited to a pat-down search for weapons. While conducting the search, the officer felt something in Rice's left-hand coat pocket. The officer testified that, based on his training and experience, it was immediately apparent that the object he felt in Rice's pocket was crack cocaine. The officer did not, however, explain what it was about the object's shape, feel, or contour that made the incriminating nature of the object immediately apparent to him. The officer's testimony did not permit a reasonable conclusion that the incriminating nature of the object was immediately apparent. Its seizure was therefore illegal in the absence of any testimony concerning the basis for the officer's knowledge.

It is not enough for officers to testify that they have general training and experience in identifying contraband without also asserting specific reasons in a particular case for knowing by plain feel that an object was contraband. To do otherwise runs the risk of having a pat-down search declared invalid and its fruits suppressed.

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